



# Michigan Tax Matters

## Four Recent Legislative Developments Address Tax Questions Important to All Attorneys

By **Wayne D. Roberts**

**T**axation in Michigan has been dynamic in recent years. We have seen two complete overhauls of the business tax structure and a repeal of the personal property tax system; we even witnessed a one-day services tax. In 2015, four additional changes fundamentally altered the manner in which taxes are administered and collected in Michigan. This article highlights these developments and provides an overview of each in a practical format for both tax and nontax attorneys.

### Have you had a client who needed to appeal a tax assessment but could not prepay the tax?

As of early 2016, taxpayers can appeal their tax disputes to a Michigan court on a pre-deprivation basis. On June 16, 2015, Governor Rick Snyder signed into law Enrolled SB 100,<sup>1</sup> eliminating the requirement that taxpayers pay all taxes, penalties, and interest before they can have their tax appeals heard by a court and guaranteeing that they have their day in court before being required to pay disputed tax assessments.

Before the enactment of SB 100, taxpayers had two options for appealing an adverse tax decision: appeal to the Michigan Tax Tribunal, a quasi-judicial agency that hears tax disputes, without paying amounts that were in dispute; or appeal to the Michigan Court of Claims, but only after paying *all* amounts assessed, including contested amounts. This dichotomy with respect to whether disputed taxes had to be prepaid created two very different alternatives for taxpayers. A taxpayer could effectively be denied access to the court

## FAST FACTS

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system simply because the disputed tax assessments were too large to prepay—even if the taxpayer might ultimately win in court. Michigan enacted SB 100 to effectively level the playing field between the two appellate alternatives for taxpayers.

### Have you had a client or contact assessed personally for a corporation's taxes?

Under Michigan's new liability provisions, only a truly responsible person should bear personal liability.

One tenet of corporate law is the well-established principle that a corporation offers "limited liability" protection, which generally means that an officer or individual shareholder of a corporation cannot be held personally liable for the corporation's debts. However, there are exceptions to the limited liability shield. One such exception exists in many states relative to state taxes.

This state tax exception, which is referred to as "officer" or "responsible person" liability, typically is statutory and allows the state revenue department to assess certain individuals *personally* for unpaid business taxes. In Michigan, under pre-2014 officer liability law, nearly any employee who signed a check to pay taxes or a tax return could be assessed for a business's unpaid taxes, including single business tax, Michigan business tax, sales, use, withholding, and other taxes.<sup>2</sup> Although the law required that a person have "tax specific authority" relative to unpaid taxes before he or she could be held personally liable,<sup>3</sup> in certain cases the individual being assessed personally did not need to be an actual officer or equity owner or even work at the company at the time the taxes at issue were due and not paid.

Michigan's officer liability reform fundamentally changed the law by narrowing both the types of individuals who can be assessed and the types of business taxes that can be collected from responsible individuals. Under the amended version of Michigan's officer<sup>4</sup> liability law,<sup>5</sup> effective for assessments made after December 31, 2013, a responsible person can be held personally liable

for a business's unpaid taxes<sup>6</sup> based only on the following statutory rules:<sup>7</sup>

- (1) As a threshold issue, the business must not pay the tax or file a return before there can be an assessment against an individual.<sup>8</sup>
- (2) The department must determine personal liability based on audit or investigation.<sup>9</sup>
- (3) Personal liability is limited to "trust fund" taxes, which are taxes that a business is required to collect from customers or employees and hold for the benefit of the government, including:
  - Sales tax
  - Use tax
  - Tobacco tax
  - Motor fuel tax
  - Motor carrier fuel tax
  - Withholding and remittance of income taxes
  - Any other tax administered under the Revenue Act that a person is required to collect from or on behalf of a third person, to truthfully account for and to pay over to Michigan<sup>10</sup>

This limitation to trust-fund taxes is the most significant economic change in Michigan's officer liability structure.

- (4) A responsible person<sup>11</sup> must be found to be both responsible *and* willful.<sup>12</sup>
- (5) The willful failure to pay had to occur during the period of default.<sup>13</sup>
- (6) The assessment must be made within four years after the assessment of the business.<sup>14</sup>
- (7) A responsible person may challenge the validity of the underlying assessment.<sup>15</sup>
- (8) The department cannot pursue a responsible individual until after it has attempted to collect from a purchaser under Michigan's successor liability provisions.<sup>16</sup>

- (9) A responsible person has a right to recover from other responsible persons based on their proportional share of responsibility in a separate proceeding in circuit court.<sup>17</sup>
- (10) The department must provide a party assessed as a responsible person with notice of any amount collected from any other responsible person or successor.<sup>18</sup>

Responsible person or officer liability assessments are burdensome and counterintuitive for attorneys and businesspeople in the context of limited liability entities such as corporations and LLCs. Michigan's recent officer liability reforms were intended to align state law more closely with business expectations under federal law and other states' laws.

### Do you buy products online?

Effective October 1, 2015, prices charged by remote sellers may increase by 6 percent.

On January 15, 2015, Gov. Snyder signed into law PA 553<sup>19</sup> and PA 554<sup>20</sup> to require remote sellers to collect and remit state sales and use tax on online purchases made by Michigan residents. The law was intended to put in-state sellers and remote sellers (i.e., retailers that have no offices in Michigan but sell to Michigan customers over the Internet) on equal footing and allow the state to collect millions of dollars of existing, but unpaid, use tax liabilities.

These acts apply two statutory tests. Under the first test, "click-through" nexus,<sup>21</sup> a collection obligation is presumed if a remote seller has representatives located in Michigan who facilitate sales by using click-through links that can be accessed on the Internet by Michigan customers. Under the second test, "affiliate" nexus,<sup>22</sup> a collection obligation is presumed if a remote seller has a specified type of affiliate located in Michigan.

The laws also contain a *de minimis* threshold to exempt small remote sellers. The laws create a presumption of nexus, which can be rebutted if the remote seller can establish that its activities in Michigan are not sufficient to create the minimum connection<sup>23</sup> required under constitutional limitations.<sup>24</sup> And while the laws depart from the physical presence rule set forth in *Quill Corporation v North Dakota*,<sup>25</sup> Michigan's statutes were drafted consistent with

laws enacted in New York (which have been upheld in litigation),<sup>26</sup> Arkansas, and California. Michigan's laws are materially different from the Illinois law that was struck down.<sup>27</sup>

### Do you know someone who could not pay off a tax liability in full and was pursued for life by the Department of Treasury's collection staff?

Michigan's Offer in Compromise program—in my view, the top tax development in 2015—allows these cases to be resolved. For decades, Michigan tax law contained an absolute prohibition against *any* compromise of *any* tax liability for *any* reason. This inflexible, outdated policy resulted in many cases in which taxpayers were forced to pay taxes that were not owed under currently applicable law.

Effective January 1, 2015, the Offer in Compromise program applies broadly to all Michigan taxes<sup>28</sup> and allows taxpayers to submit an offer to compromise a tax debt for less than the amount due based on one or more of the following statutory criteria:<sup>29</sup>

- A doubt exists concerning the liability based on evidence provided by the taxpayer.
- A doubt exists concerning the collectability of the tax due based on the taxpayer's financial condition.
- A federal offer in compromise has been given for the same tax year(s).

The following table outlines practical offer-in-compromise issues that should be of interest to all Michigan attorneys:<sup>30</sup>

#### To submit an offer in compromise, all of the following must be true:

- The taxpayer must have filed returns for all tax periods.
- The taxpayer must have been assessed and the time period for all appeals must have expired.
- The taxpayer must have no open bankruptcy proceedings.

#### Legal professionals should be aware that, when submitting an offer in compromise:

- Taxpayers *must* submit a nonrefundable initial offer payment of \$100 or 20 percent of the offer, whichever is greater, and use the official Department of Treasury forms and schedules:

**Form 5181**—Michigan offer in compromise

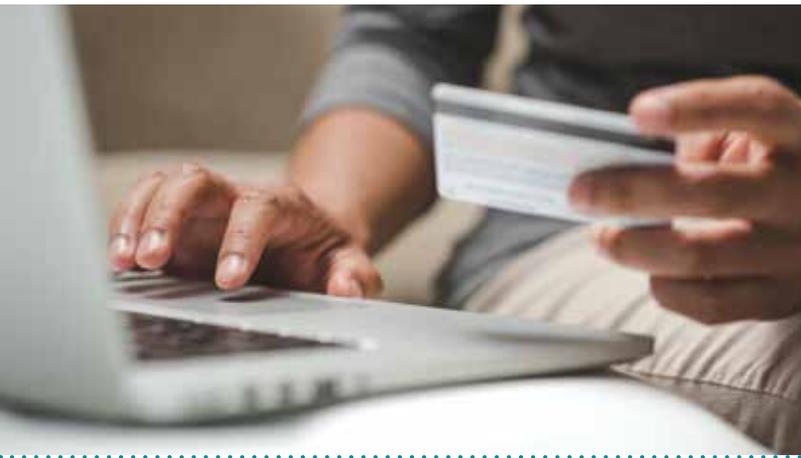
**Form 5182**—Federal offer in compromise from the Internal Revenue Service (IRS)

**Form 5183**—Doubt exists as to the **Collectability (Individuals)**

**Form 5184**—Doubt exists as to the **Collectability (Business)**

**Form 5185**—Doubt exists as to the **Liability**

On January 15, 2015, Gov. Snyder signed into law PA 553 and PA 554 to require remote sellers to collect and remit state sales and use tax on online purchases made by Michigan residents, allowing the state to collect millions of dollars of existing, but unpaid, use tax liabilities.



For doubt-as-to-collectability cases, many Michigan taxpayers may need pro bono assistance with making offers that are properly drafted. Fortunately, there are several options, including the Michigan State University Alvin L. Storrs Low Income Taxpayer Clinic,<sup>31</sup> the Western Michigan University Thomas M. Cooley clinical programs, the University of Michigan Clinic, and the State Bar of Michigan Taxation Section Pro Bono Taxpayer Clinic.<sup>32</sup>

## Conclusion

Michigan tax law—and tax administration—can be complex and dynamic. All attorneys should be aware of four of the most compelling<sup>33</sup> changes that took place in the past year. ■



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## ENDNOTES

- 2015 PA 79.
- MCL 205.27a(5) (effective for assessments issued before January 1, 2014).
- See *Livingstone v Dept of Treasury*, 434 Mich 771; 456 NW2d 684 (1990).
- Although this article refers to “officer” liability, liability is not limited to corporate officers, and an officer, manager, or member of an LLC or partner in a partnership can be held personally responsible for the relevant entity’s debts—both before and after December 31, 2013. See MCL 205.27a(15)(b).
- MCL 205.27a(5).
- For a comprehensive analysis of Michigan’s amended officer liability statute, see McKim, *Fundamental Changes and Potential Problems with Michigan’s New Amended Revenue Act Provisions Making “Responsible Persons” Liable for Unpaid Business Tax Assessments*, 41 Mich Tax Lawyer 4 (Winter 2015).
- In addition, although an assessment against an individual that is made before January 1, 2014, may include a more comprehensive group of business taxes, the Michigan Court of Appeals has held that the revised officer liability requirements apply retroactively to all assessments made against a responsible individual. *Shotwell v Dept of Treasury*, 305 Mich App 360; 853 NW2d 414 (2014).
- MCL 205.27a(5).
- Id.*
- MCL 205.27a(14)(a) and (b).
- MCL 205.27a(15)(b).
- Under MCL 205.27a(15)(d), willful or willfully means that the person knew or had reason to know of the obligation to file a return or pay the tax, but intentionally or recklessly failed to file the return or pay the tax.
- MCL 205.27a(15)(c).
- MCL 205.27a(5).
- Id.*
- Id.*
- Id.*
- Id.*
- 2014 PA 553 (codified as MCL 205.52b) (sales tax).
- 2014 PA 554 (codified as MCL 205.95a) (use tax).
- See MCL 205.52b(3).
- See MCL 205.52b(1).
- See *Tyler Pipe Indus, Inc v Washington Dep’t of Revenue*, 483 US 232; 107 S Ct 2810; 97 L Ed 2d 199 (1987) (finding that the applicable test is whether the activities performed in the taxing state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in the taxing state for sales). The *Tyler Pipe* test remains the controlling factor in nexus determinations in Michigan.
- The legislative history associated with both new statutes indicates that both Michigan statutes create a “presumption” that nexus—and a collection obligation—exists for the remote seller. The presumption “could be rebutted by a demonstration that a person’s activities in Michigan were not significantly associated with the seller’s ability to establish or maintain a market in the State for the seller’s sales of tangible personal property to purchasers in Michigan” if it can provide evidence of all of the following:
  - Written agreements prohibiting all of the residents with an agreement with the seller from engaging in any solicitation activities in [Michigan] on behalf of the seller.
  - Written statements from all of the residents with an agreement with the seller stating that the resident representatives did not engage in any solicitation or other activities in [Michigan] on behalf of the seller during the immediately preceding 12 months, if the statements are provided in good faith. MCL 205.52b(4)(a) and (b).

Legislative Analysis, SB 658 and 659, December 8, 2014.

- Quill Corp v North Dakota*, 504 US 298; 112 S Ct 1904; 119 L Ed 2d 91 (1992).
- See *Amazon.com v New York Dep’t of Taxation and Finance*, 20 NY3d 586; 987 NE2d 621 (2013).
- See *Performance Mktg Ass’n Inc v Hamer*, 2013 IL 114496; 375 Ill Dec 762; 998 NE2d 54 (2013) (Illinois click-through nexus law invalidated as a violation of the Internet Tax Freedom Act, 47 USC 151, because it discriminated against interstate commerce; the Illinois statute did not create a general “presumption” that could be rebutted, but instead found that nexus was created by Internet sellers making sales to Illinois residents, but not by catalog sellers making similar sales to Illinois residents).
- HB 4003 (Enacted as 2014 PA 240).
- See Michigan Department of Treasury, *Offer in Compromise* <<http://www.michigan.gov/oic>>. All websites cited in this article were accessed April 3, 2016.
- This table contains information adapted from the Michigan Department of Treasury’s website (see <<http://www.michigan.gov/oic>>), and from the presentation made by Nicole Schultz, Wayne D. Roberts, and Thomas J. Kenney at the 2015 SBM Taxation Section Annual Tax Conference.
- The Michigan State University clinic was named, posthumously, in honor of Alvin L. Storrs, renowned tax attorney, tax professor, SBM Taxation Section member, and friend. See MSU College of Law, *Alvin L. Storrs Low-Income Taxpayer Clinic* <<http://www.law.msu.edu/clinics/tax/index.html>>.
- The SBM Taxation Section Pro Bono Taxpayer Clinic was founded in 2014 to provide exactly this type of support to people in need. For any attorneys interested in providing pro bono tax representation, please see SBM Taxation Section, *Tax Pro Bono Referral Panel Program* <<http://connect.michbar.org/tax/programs/probono>>.
- In the author’s view.